FILE COPY

Office - Supreme Court, U. S.
FILED
APR 28 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 540

NELSON FOSTER AND GEORGE PAYNE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
208 South LaSalle St., Chicago 4, Ill.,
Attorney for Respondent.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
JAMES C. MURRAY,
Assistant Attorneys General,
Of Counsel.

CHAMPLIN-SUGALY COMPANY, CHICAGO 3-47

INDEX.

	PAGE
Respondent's Statement of the Case	1
The Facts Appearing on the Record	2
The Questions Presented	3
Argument:	
I. Federal due process does not imply a categorical right to counsel in non-capital State cases. Special circumstances, such as a more than ordinarily complex case or a less than ordinarily understanding accused, must exist in order to warrant invocation of the Fourteenth Amendment	5
II. Even if due process required the appointment of counsel in this case unless the accused chose to dispense therewith, the case could not be reversed on the common law record on writ of error. Other remedies, original and not appellate in office and nature, are available in Illinois for the assertion of any rights that petitioners may have or claim.	13
III. The record fails to show or to support a fair inference that the prisoners had "special need for advice of counsel because of the difficult legal questions involved" or were "unconstitutionally rushed through trial"	16
Conclusion	19

Table of Cases.

Adams v. United States, 317 U. S. 269.....4, 5, 15, 16, 18
Betts v. Brady, 316 U. S. 455.....4, 6, 16
Canizio v. New York, 327 U. S. 82..... 11
Carter v. Illinois, 329 U. S. 173.....4, 14, 15
Cundelf v. Nicholson, 107 Fed. 2d 162..... 9
DeMeerleer v. Michigan, ... U. S. ..., 67 S. Ct. 596.. .....11, 12, 15
House v. Mayo, 324 U. S. 42.....11, 12, 15
Johnson v. Zerbst, 304 U. S. 458..... 13
Lutz v. Ragen, 324 U. S. 760..... 15
People v. Bogolowski, 317 Ill. 460.....15, 19
People v. Green, 355 Ill. 468..... 14
Powell v. Alabama, 287 U. S. 45..... 12
Rice v. Olson, 324 U. S. 786.....4, 11, 15, 18
Tomkins v. Missouri, 323 U. S. 485..... 12
White v. Ragen, 324 U. S. 760.....14, 15
Woods v. Nierstheimer, 328 U. S. 211..... 15

Statutes Cited.

Constitution of the United States, Fifth Amendment.. 9
Constitution of the United States, Sixth Amendment. 5, 9
Constitution of the United States, Fourteenth Amendment 5, 6, 9
Alabama, Code of Ala. 1940, Title 15, Art. 2, par. 318.. 8
Florida, General Stats. 1906, sec. 3969..... 8
Florida, Revised Statutes 1941, par. 909.21..... 8
Cahill's Illinois Revised Stats. 1933, Ch. 38, pars. 65, 795-796 ..... 2, 3
Illinois Revised Stats. 1945, Ch. 38, par. 84..... 2, 3
Massachusetts, General Laws of Mass. 1932, Ch. 277, sec. 47 8
Michigan, Complied Laws of Mich. 1929, Ch. III, sec. 17129 8
Mississippi, Miss. Code, 1930, Ch. 21, sec. 1262..... 8
New Jersey, Gilbert's Cr. Code, 1927, Ch. 4, sec. 308... 8
North Carolina, Stats. 1943, Ch. 15, sec. 15-4..... 8

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 540

NELSON FOSTER AND GEORGE PAYNE,
Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

RESPONDENT'S STATEMENT OF THE CASE.

Counsel whom this court has appointed for petitioners has accurately stated the full substance of the record. However, being naturally and understandably anxious to present his case in the aspect most favorable to men whose liberty is at stake and to whom he owes the highest responsibility, he has, by accent upon and emphasis of certain features of the record, cast his statement in a somewhat tendentious form.

Focus of emphasis in stating facts is highly commendable in an advocate for an accused. It should be forborne

by counsel for the state until the argument. We therefore summarize the naked facts of the record in a form which is the more brief because petitioners' statement is complete in substance.

The Facts Appearing on the Record.

Petitioners were charged by indictment with burglary of a dwelling house and petty larceny of property of the value of five dollars in the circuit court of Pulaski County, Illinois, on February 22, 1935. The indictment was, as counsel for petitioners points out, orthodox and therefore technical in its verbiage. One of the burglary counts accused the defendants in substance of breaking and entering without force while the other count charged them with breaking and entering with force, both counts charging criminal intent. These counts embodied alternative forms of the Illinois statutory charge of burglary (Ill. Rev. Stats. 1933, Ch. 38, par. 84).

On the same day, according to the record (R. 3-4), petitioners were furnished with a copy of the indictment, a list of the jurors and a list of the State's witnesses, were advised of their "rights of Trial and of the consequences of an entry of a plea of guilty" (R. 3), and, being arraigned, pleaded "guilty of burglary and larceny as charged in the indictment."

The record recites that thereupon each of said defendants still "presist (*sic*) in such pleas of guilty" (R. 3). The court then found the ages of petitioner Foster to be 34 years and of petitioner Payne (*alias* Jefferson) to be 48 years.

The judgment of the court was the statutory sentence for a period of not less than one year and which might extend to life. (Cahill's Ill. Rev. Stats. 1933, Ch. 38, par.

65. 1945, Ch. 38, par. 84.) At the time that the sentence was imposed, the court had no discretion with respect to the minimum or maximum term that one convicted of felony might serve in Illinois except in capital cases, rape and arson.[1] (Cahill's Ill. Rev. Stats., 1933, Ch. 38, pars. 795-796.)

The record is silent as to the matter of counsel.

These, then, are the only facts in this case explicitly patent upon the record. All other statement as to or discussion of facts, either upon the part of counsel for the petitioners or ourselves, is in the nature of inference, deduction or asserted presumption.

The Questions Presented.

We do not conceive the questions presented in the same terms that petitioners' counsel conceives them. We deem them to arise from the following considerations:

This court has held that **upon an affirmative showing of prejudice, either appearing in the record or alleged in proceedings contemplating and appropriate to a hearing of evidence dehors the record,** due process is denied by a State court's failure to appoint counsel even though the case is non-capital, counsel is not requested, and a plea of

---

[1] As counsel for petitioners observes in the margin of page 5 of his brief, petitioners asserted by extrajudicial interpolations which 'the' appended to the otherwise properly authenticated record in the Supreme Court of Illinois charges of matter *dehors* that record to the effect that they were told by the State's Attorney that they did not need counsel and would be sentenced merely to one year in the penitentiary. But petitioners' counsel concedes that this charge was not supported by any fact appearing in the common law record and recognizes the pertinency of this court's holding in *Carter* v. *Illinois*, 329 U. S. 173, that Illinois does not deny due process when, in accordance with this court's own practice, it refuses to consider assertion of matter *dehors* the record on writ of error or other strictly appellate review. See, e.g., *Mathews* v. *United States*, 123 U. S. 182; where this court recognized that on its writ of error its review was confined to the record; and *Claassen* v. *United States*, 142 U. S. 140, where this court said, at page 147:

> "Upon writ of error, no error in law can be reviewed by this court which does not appear upon the record, or by bill of exceptions made part of the record."

guilty is received. Illinois concedes this rule (*Rice* v. *Olson*, [illegible] U. S. 786, and other cases cited by petitioners' counsel).

But it has also held that **absent a showing of prejudice,** due process is not denied by the fact *per se* of failure to appoint counsel, even though the plea is not guilty and counsel is requested, in a non-capital case (*Betts* v. *Brady*, 316 U. S. 455, cf. *Adams* v. *United States*, 317 U. S. 269). And this is true even in a capital case where the right is intelligently waived if prejudice, though charged, does not appear upon the record. (*Carter* v. *Illinois*, 329 U. S. 173.) Therefore the questions emerge:

1. Does federal due process require the appointment of counsel before receiving pleas of guilty in all non-capital State cases where the punishment may extend for many years or life unless the right is waived, or must special circumstances, such as a more than ordinarily complex case or a less than ordinarily understanding defendant, be present in order to require the appointment of counsel?

2. If special circumstances must be present in order to entitle one accused of a non-capital offense in a State court to counsel, must the existence of such special circumstances be presumed where, as in this case, the record contains no explicit matter rebutting such presumption, or may the state remit accused to such *de novo* proceedings as *habeas corpus* or *coram nobis* for inquiry as to such circumstances?

ARGUMENT.

I.

Federal due process does not imply a categorical right to counsel in non-capital State cases. Special circumstances, such as a more than ordinarily complex case or a less than ordinarily understanding accused, must exist in order to warrant invocation of the Fourteenth Amendment.

In *Adams* v. *United States*, 317 U. S. 269, a case cited and heavily relied upon by petitioners, this court said at pages 276-277:

> "* * * Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended. * * * **And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice.** * * *" (Emphasis supplied.)

The language above quoted is the more incisive because in that case the specific guaranty of the right to counsel of the Sixth Amendment was invoked.

The question: DOES FEDERAL DUE PROCESS CATEGORICALLY IMPLY THE RIGHT OF COUNSEL UPON ARRAIGNMENT IN NON-CAPITAL STATE CRIMINAL CASES? must be considered in an historical, social and legal context that we discuss below.

The practice of receiving pleas of guilty without tendering counsel was inveterate and very general throughout the United States before the advent of the Fourteenth

Amendment. (*Betts* v. *Brady*, 316 U. S. 455.) It has continued to be the general, indeed, to constitute the common practice in at least half the states of the Union, since the adoption of that amendment. (See historical discussion, *post.*) Therefore, to the extent that consensus on the part of state courts is valid as a *criterion* for the construction of an amendment applicable only to the states, any claim that the right to counsel in non-capital cases is implicit in the notion of civilized government must fail.

Counsel associated with the writer of this brief have prepared a "*Study of the Right to Counsel in State Criminal Cases,*" which is annexed to this brief as Appendix thereof. (*Post*, page 20.) It amplifies and brings down to date the similar study appended to this court's opinion in *Betts* v. *Brady*, 316 U. S. 455.

This court's study appended to its opinion in *Betts* v. *Brady* and our own survey leave no doubt of the following historical and contemporary facts of criminal jurisprudence in state courts:

RIGHT TO COUNSEL IN STATE CRIMINAL CASES: HISTORICAL CONSIDERATIONS.

In the cases cited in the margin, courts of review in twenty-four states have directly held that there is a waiver of the right to counsel where the accused fails to request counsel.[2] Since a few courts do not seem to have passed upon the question, it follows that a majority of states passing on the question have adopted this view.

---

[2] ALABAMA: *Mackreth* v. *Wilson*, 31 Ala. App. 191, 15 So. (2d) 112, Cert. den. 15 So. (2d) 114; CALIFORNIA: *People* v. *Looney*, 9 Cal. App. (2d) 335, 49 P. (2d) 889; *Davis* v. *Crowder*, 78 P. (2d) 1039; FLORIDA: *Weatherford* v. *State*, 76 Fla. 219, 79 So. 680; GEORGIA: *Rowland* v. *State*, 72 Ga. App. 793, 35 S. E. (2d) 372, 375; *Gatlin* v. *State*, 17 Ga. App. 406, 878 E. 151; *Gatlin* v. *State*, 87 S. E. 151, 17 Ga. App. 406; IDAHO: *State* v. *Athens* (1922), 36 Ida. 224, 210 P. 133, 134; ILLINOIS: *People* v. *Fuhs*, 390 Ill. 41; *People* v. *Corbett*, 387 Ill. 41; *People* v. *Lavendowski*, 326 Ill. 173; *People* v. *Batey*, 392 Ill. 390; *People* v. *Parcora*, 358 Ill. 448; INDIANA: *Loucks* v. *State*, 213 Ind. 108, 11 N. E. (2d) 694; IOWA: *Korf* v. *Jasper Co.* (1906), 132 Ia. 682, 108 N. W. 1031, 1032; KANSAS: *Jones* v. *Amrine*, 154 Kan. 629, 121 P. (2d) 263; *Loftis* v. *Amrine*, 152 Kan. 464, 105 P. (2d) 890; *Allen* v. *Amrine*, 127 P. (2d) 475, 155 Kan. 703; KENTUCKY: *Hamlin* v. *Commonwealth*, 287 Ky. 22, 152 S. W. (2d) 297;

In the cases cited below, the courts of six states have held that there is a waiver of the right to counsel where the defendant pleads guilty to a non-capital offense and fails to request counsel.[3]

Thus the courts of at least one-half of the states of the Union have not regarded the right to counsel, at least in non-capital cases where there is an acknowledgment of guilt in open court, as implicit in the concept of due process of law.

The study also collates constitutional and statutory provisions defining, recognizing or touching the right to counsel. Most states have constitutional statutory provisions guaranteeing in general terms the right to counsel. But in Alabama the statute requires appointment of counsel

---

Turner v. *Commonwealth*, 89 Ky. 78, 1 S. W. 475; *Grogan* v. *Commonwealth*, 222 Ky. 482, 1 S. W. (2d) 779; *Holland* v. *Commonwealth*, 455 S. W. (2d) 476, 241 Ky. 813; LOUISIANA: *State* v. *Davis*, 171 La. 449, 131 So. 295; *State* v. *Murray* (1928), 165 La. 653, 115 So. 813; *State* v. *Sims*, 42 So. 494, 117 La. 1035; MICHIGAN: *People* v. *Fries*, 294 Mich. 382, 293 N. W. 689; *People* v. *Haddad*, 306 Mich. 556, 11 N. W. (2d) 240, 241; MISSISSIPPI: *Dugan* v. *State*, 151 Miss. 781, 119 So. 298; MISSOURI: *State* v. *Miller*, 292 S. W. 440, 442; *State* v. *Terry*, 201 Mo. 697, 100 S. W. 432; MONTANA: *State* v. *Fowler*, 196 P. 992; NEBRASKA: *Alexander* v. *O'Grady*, 137 Nebr. 645, 290 N. W. 718; *Davis* v. *O'Grady*, 137 Nebr. 708, 291 N. W. 82, 86; *Ex Parte Tail*, 145 Nebr. 268, 16 N. W. (2d) 161, 162; NEVADA: *State* v. *Mackinnon*, 168 P. 330, 41 Nev. 182; NEW JERSEY: *State* v. *Murphy*, 87 N. J. L. 515, 94 A. 640; *State* v. *Raney*, 63 N. J. L. 363, 43 A. 677; NEW YORK: *People* v. *Price*, 262 N. Y. 410; 187 N. E. 298, 300; PENNSYLVANIA: *Commonwealth* v. *Smith*, 344 Pa. 41, 24 Atl. (2d) 1; *Commonwealth* v. *Smith*, 147 Pa. Super. 423, 24 Atl. (2d) 724; *Commonwealth* v. *Burke*, 158 Pa. Super. 87, 43 Atl. (2d) 921; *Commonwealth* v. *Smith*, 158 Pa. Super. 104, 43 A. (2d) 906; *Commonwealth* v. *Ashe*, 141 Pa. Super. 408, 15 A. (2d) 409; *Commonwealth ex rel. Piccerelli* v. *Smith*, 27 A. (2d) 484; SOUTH CAROLINA: *State* v. *Jones*, 172 S. C. 129, 173 S. E. 77; TEXAS: *Brown* v. *State*, 118 Tex. Cr. R. 582, 40 S. W. (2d) 118; *Brady* v. *State*, 122 Tex. Cr. R. 275, 54 S. W. (2d) 513, 514; VIRGINIA: *Wilkinson* v. *Youell*, 180 Va. 321, 238 E. (2d) 356, 359; *Barnes* v. *Commonwealth* (1895), 92 Va. 794, 23 S. E. 784, 787; WEST VIRGINIA: *State* v. *Yoes* (1910), 67 W. Va. 546, 547, 68 S. E. 181; WYOMING: *James* v. *State* (1921), 27 Wyo. 378, 196 P. 1045.

[3] GEORGIA: *Rowland* v. *State*, 72 Ga. App. 793, 35 S. E. (2d) 372, 375; KANSAS: *Jones* v. *Amrine*, 154 Kan. 629, 121 P. (2d) 263; *Loftis* v. *Amrine*, 152 Kan. 464, 105 P. (2d) 890; MICHIGAN: *People* v. *Fries*, 294 Mich. 382, 293 N. W. 689; NEBRASKA: *Alexander* v. *O'Grady*, 137 Nebr. 645, 290 N. W. 718; *Davis* v. *O'Grady*, 137 Nebr. 708, 291 N. W. 82, 86; *Ex Parte Tail*, 145 Nebr. 268, 16 N. W. (2d) 161, 162; PENNSYLVANIA: *Commonwealth* v. *Ashe*, 141 Pa. Super. 408, 15 A. (2d) 409; VIRGINIA: *Wilkinson* v. *Youell*, 180 Va. 321, 23 S. E. (2d) 356, 359.

only in capital cases. (Code of Ala. 1940, Title 15, Art. 2, par. 318.) In Florida, although the right to appear by counsel is guaranteed (Fla. General Stats. 1906, sec. 3969), appointment of counsel is required only in capital cases. (Fla. Rev. Stats. 1941, par. 909.21.) In Massachusetts, whose jurisprudence is often consulted as a repository of legal and constitutional tradition and history because of that state's colonial origin, it was provided as late as 1932, as follows:

> "If a prisoner, under indictment for a capital crime, pleads guilty, upon being arraigned, the court shall award sentence against him; if he does not plead guilty, the court may assign him counsel and take all other measures preparatory to a trial, which shall, subject to Section 72, be held as soon after the finding of the indictment after other official duties of the justices will admit and the circumstances of the cases require." (General Laws of Mass. 1932, Ch. 277, sec. 47.)

In Mississippi, the statute provides that the right to appointed counsel as distinct from the right to appear by counsel if the defendant can himself obtain counsel, is confined to capital cases. (Miss. Code, 1930, Ch. 21, sec. 1262.)

It is perfectly true, as appears from the study that some states expressly provide for the appointment of counsel in all felonies and a few so provide even in cases of misdemeanors. (Cf. Compiled Laws of Michigan, 1929, Ch. III, sec. 17129.) In New Jersey, a statute provides that "if the defendant appears for arraignment without counsel, he must be asked if he desires the aid of counsel, and if he does the court must assign counsel." (Gilbert's Criminal Code, 1927, Ch. 4, sec. 308.) North Carolina by statute guarantees counsel to "every person accused of any crime whatsoever." (N. C. Stats. 1943, Ch. 15, sec. 15-4.) Other similar statutes will be found in the study.

But these statutory provisions, although evincing a recognition of the desirability of counsel in all criminal cases, are, when read in comparison with the statutes and decisions (cited above) in which at least half of the states of the Union have held or enacted that the right is not absolute, at least in non-capital cases, cannot be deemed declarations of American constitutional doctrine. Indeed, they may be read as at least suggesting that they were enacted, not as confirmatory of antecedently existing constitutional rights, but in recognition that there was no well understood constitutional tradition guaranteeing counsel in all felony cases in state courts.

The Circuit Court of Appeals for the Fourth Circuit has directly held that a plea of guilty to a non-capital offense raises a presumption of voluntary and competent waiver of the right to counsel. *Cundeff* v. *Nicholson*, 107 Fed. (2d) 162.

This case cannot be reversed on the common law record alone unless this court is prepared to hold that in every serious criminal case, the trial court must appoint counsel for the accused before receiving a plea of guilty or to recite affirmatively a waiver of the right. Nothing in the entire history of Anglo-American jurisprudence even suggests, much less requires, such a result. Neither the Fifth, the Sixth nor the Fourteenth Amendments has ever been construed by any court (insofar as patient research has disclosed) as requiring categorically, absolutely and mechanically, that no man may plead guilty to a non-capital crime, no matter what the circumstances, without counsel.

Should this court commit itself to the declaration of such a principle in the instant case, many thousands of prisoners now incarcerated in state prisons upon pleas of guilty entered after the right to counsel was declined would be set

at large. This result would, of course, not deter this court from such a declaration if it were convinced that the organic law of the United States could not otherwise be properly expounded.

But the practical construction, acquiesced in by nearly every *nisi prius* court and many courts of review from days long antedating the Constitution until the present moment, demonstrates conclusively and absolutely that such a holding would not serve the understanding either of the framers of the Constitution or of any of the many thousands of jurists and constitutional scholars who have perused and applied its text in criminal cases.

And where the text of the Constitution has long been construed by virtually unanimous consensus, an exegetical reading overriding that consensus is certainly not necessary and, we submit for important reasons briefly noted in the margin, is not even appropriate.[4]

This is, of course, not to say that if the record shows

---

[4] A question theoretically implicit in every problem of constitutional construction and practically exigent in the instant case may be stated by asking, When the meaning of the Constitution is sought, whose understanding is to determine the "meaning"? Is it the meaning of that instrument to its authors, or to those who adopted the Constitution and the several amendments that have been added thereto by voting in favor thereof, or to academicians in the field of political philosophy, or to lawyers generally, or to the hypothetical "reasonable man"? And if the latter, then is it the probable meaning to the "reasonable man" of the time of the adoption of the Constitution (or the amendment in question, as the case may be), or to the "reasonable man" of today? Or is it perchance a composite question of what ideas a "reasonable man of today" would ascribe to a putative "reasonable man" reading the constitutional language at the time of its adoption?

While it is this court that decides questions of constitutional interpretation, it does so upon the assumption that it is reading a document that has been read by others whose understanding of its language is important. In short, this court must state its own understanding of a presumable "general" understanding of the constitution as a document, not of this court alone, but of the people.

In the instant case, the court is confronted with a plea of guilty entered in a form and mode that has been known to the common law for centuries. Unanimous, or virtually unanimous, approbation of the acceptance of such pleas where counsel is offered and declined is, we submit, not merely relevant but *conclusive* on what the constitution means in this connection to those intrusted with supporting and enforcing it.

that in a given case, the accused should have been tendered counsel in order to prevent a miscarriage of justice, due process would not be denied. This court has held the contrary. (See Point II, *post*, which is devoted to (1) a discussion of the circumstances under which the appointment of counsel is required in non-capital state cases and (2) the appropriate mode of establishing those circumstances, which we say is not by presumption from a naked common law record.)

Petitioners rely upon the following non-capital state cases: *House* v. *Mayo*, 324 U. S. 42; *Rice* v. *Olson*, 324 U. S. 786; *De Meerleer* v. *Michigan*, ..., U. S. ...., 67 S. Ct. 596; *Canizio* v. *New York*, 327 U. S. 82. *Each one* of these cases was, under the governing state procedure, a proceeding contemplating *de novo* investigation of matter *dehors* the common law record. In *each one* of these cases, the convicted prisoner alleged special circumstances showing actual prejudice. In *each one* of these cases a hearing was denied on the merits. In each one of these cases, this court predicated its decision on the special circumstances, alleged in a proceeding in which allegations of fact was proper, the allegations being undenied and therefore admitted. In each case the court said that the *particular circumstances* alleged were sufficient to show a denial of due process. We summarize the special circumstances in each case, respectively, in the margin.[5]

---

[5] *Rice* v. *Olson*, 324 U. S. 786: In this case petitioner was an Indian and it was made affirmatively to appear that there was an exceedingly difficult question, involving the reconciliation of conflicting rights of sovereignty with respect to whether the *locus* of the crime was within the exclusive federal criminal jurisdiction. The court emphasized "the complexities of the problem" and found it pertinent to observe that "a decision of the state court that it had jurisdiction might not have finally determined the issue."

Canizio v. *New York*, 327 U. S. 82: In this case the defendant was nineteen years old, therefore presumed by the common law to be incapable of making even the simplest contract, and made an affirmative showing by affidavit, that he was "unfamiliar with his legal rights." Even then the court affirmed the conviction on the ground that counsel who later represented him waived his right, if right he had, to vacate the judgment. But in discussing what the situation would have been

Not one of these cases declares or, we submit, fairly intimates that on a mere common law record, showing an acknowledgment of guilt of a simple type of crime and not suggesting that there was either special circumstance or injustice in the receiving of such acknowledgment of guilt, there is such a right of counsel that the State reviewing court must reverse *for a new trial on the issue of guilt* or this court will.

We emphasize the words "reverse for a new trial *on the issue of guilt*," as distinguishing the issue from one as to a hearing on the issue of whether the plea was understand-

---

"had there been nothing to contradict petitioner's general allegation that he was not represented by counsel in the interim between his plea of guilty and the time he was sentenced," this court said only that *"his charge would have been such as to require the court to hold a hearing on his motion."* The court did *not* hold that he was entitled to an *outright reversal* upon the common law record.

Tomkins v. *Missouri*, 323 U. S. 485 and the companion case, *Williams* v. *Kaiser*, 323 U. S. 471: In these cases, although the offenses were both capital, the petitioners made affirmative showings *contemplating the hearing of evidence on the issues tendered by those allegations* that they were incapable of making a defense.

Adams v. *United States*, 317 U. S. 269: The Circuit Court of Appeals issued an "auxiliary writ of *habeas corpus*" upon which writ evidence was taken *dehors* the record as to the competence of the accused to waive the right of counsel.

Powell v. *Alabama*, 287 U. S. 45: The record affirmatively showed and this court emphasized special circumstances consisting of the fact that the accused were negroes in a hostile white community, that there was substantial doubt as to their guilt, and that they were forced to trial without adequate preparation, as justifying reversal.

DeMeerleer v. *Michigan*, ... U. S. ..., 67 S. Ct. 596: The defendant asserted his rights by a proceeding contemplating an investigation of whether, *in that particular case*, due process was denied.

House v. *Mayo*, 324 U. S. 42: Here petitioner did not complain of failure to appoint counsel but of unreasonable failure to consult with counsel whom he already had. The court said: "We need not consider whether the state would have been required to appoint counsel for petitioner on the facts alleged in the petition." And it said this notwithstanding allegations of such "special circumstances" as that when petitioner was brought into court "without previous warning" and information was handed up making the charge of burglary, that he importuned the court for time to communicate and consult with an attorney whom he had already engaged, that he was "in his twenties, uneducated and a stranger in the town." In this case, with the fact undisputed that petitioner was not represented by counsel at the time of the trial, all that the court held that he was entitled to was a hearing upon his charge of denial of due process. There is no intimation that he would have been entitled to an outright reversal upon the common law record.

ingly made and whether special circumstances warrant the vacation of the judgment, because on writ of error in Illinois, the judgment must be one of affirmance, vacation of the judgment for trial, or discharge. Petitioners do not and cannot suggest that they cannot now obtain a hearing on the issue of whether they were actually or probably prejudiced on the particular facts of their case by simple application to the Illinois court asserting facts constituting or entailing prejudice. Their right to such a hearing is clear. (See Point II, *post.*)

II.

Even if due process required the appointment of counsel in this case unless the accused chose to dispense therewith, the case could not be reversed on the common law record on writ of error. Other remedies, original and not appellate in office and nature, are available in Illinois for the assertion of any rights that petitioners may have or claim.

Thus far neither this nor any other court has declared that absent particular circumstances of special prejudice, federal due process is denied by the mere failure to furnish counsel in a non-capital state case. Certainly no court has ever so held in cases where a plea of guilty was received. (See Point I, *ante,* and the cases there cited.) And even in capital cases, where life itself is at stake, this court has said that the accused may waive counsel if he does so intelligently and understandingly.

In *Johnson* v. *Zerbst,* 304 U.S. 458, this court, speaking through Mr. Justice Black, said, at pages 468-469:

> "• • • Where a defendant, without counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas*

> *corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of counsel. * * *"

Carter v. *Illinois*, 329 U. S. 173, was a capital case. It came before the court on a common law record reciting that the court

> "fully explained to the defendant * * * the consequences of such plea, including the right to have a lawyer appointed by the Court to defend him"

and the right of trial. The record in the instant case does not, it is true, contain the verbiage, "including the right to have a lawyer appointed by the Court to defend him." But it does recite (R. 3) that the defendants

> "are advised of their rights of Trial and of the consequences of an entry of a plea of guilty * * *."

For aught that appears to the contrary, the crime was a simple one and the defendants freely acknowledged unlawful entry with intent to commit larceny, which are the only two essential elements of the crim .

True, we have said only, "For aught that appears to the contrary." But if the accused were actually prejudiced, they have in substance **the same remedy that was invoked in each of the cases relied upon by their counsel as most nearly similar to the instant case**, namely, application to the trial court upon charges of unfairness.

The Supreme Court of Illinois has specifically held that, *even in a misdemeanor case*, where the absence or even the mere inadequacy of counsel actually prejudices the accused, *coram nobis* is appropriate. (*People* v. *Green*, 355 Ill. 468.) This court has held that the Illinois Supreme Court need not entertain the claim of betrayal by appointed counsel (*White* v. *Ragen*, 324 U. S. 760) or even the absence of counsel in a capital case (*Carter* v. *Illinois*, 329

U. S. 173) where there is an adequate remedy by statutory proceedings in the nature of a writ of error *coram nobis*. And this court assumes that Illinois' remedy in that behalf is adequate. (*Woods* v. *Nierstheimer*, 328 U. S. 211; *White* v. *Ragen*, 324 U. S. 760; *Lutz* v. *Ragen*, 324 U. S. 760, a companion case to *White* v. *Ragen*, *id.*)

Petitioners assert, although only by extrajudicial interpolations written upon but forming no part of the record, that they were induced to plead guilty by a promise on the part of the State's Attorney. If this is true, petitioners have a very clear right under Illinois law to move to vacate the judgment against them. *People* v. *Bogolowski*, 317 Ill. 460, is directly in point. In that case the accused, having been promised leniency or immunity if he would plead guilty and testify against co-defendants, did plead guilty and did testify against them. He received a severe sentence in breach of the promise of leniency. He then made a motion to vacate the judgment and sentence, asserting his understanding with the State's Attorney. The Supreme Court of Illinois held that promises made by the State's Attorney to induce a confession and plea of guilty afforded clear grounds for vacating the judgment upon simple motion in the trial court. It reversed the trial court's denial of the motion.

If, therefore, petitioners' pleas of guilty were anything other than a simple acknowledgment of actual guilt of a charge to which they had no defense, or if their pleas were induced by false promises, or if the pleas were in fact due to a misunderstanding of petitioners' rights, they may do precisely what was done by Rice (*Rice* v. *Olson*, 324 U. S. 786), House (*House* v. *Mayo*, 324 U. S. 42), DeMeerleer (*De Meerleer* v. *Michigan*, . . . U. S. . . ., 67 S. Ct. 596) and McCann (*Adams* v. *U. S. ex rel. McCann*, 317 U. S. 269), namely, present a simple motion to the trial court suggest-

ing facts and circumstances that demonstrate, or at least raise a fair inference, of denial of due process.

III.

The record fails to show or to support a fair inference that the prisoners had "special need for advice of counsel because of the difficult legal questions involved" or were "unconstitutionally rushed through trial."

Petitioners' counsel makes the charge, which would be most serious if it were supported by the record, that "The petitioners were not advised of their right to counsel, did not waive this right, and despite their special need for advice of counsel because of the difficult legal questions involved, their conviction and sentencing were hurried through without any assistance of counsel." (*Petitioners' Br.*, caption to Point I, p. 8.)

At page 12 of petitioners' brief, their counsel summarizes in a subcaption his contention that "petitioners were rushed through trial on serious offenses without opportunity for reflection or consideration."

If this court rejects the considerations developed in Point I of this brief, *ante*, retracts its declaration in *Adams* v. *United States*, 317 U. S. 269, that to hold that

> "a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt" would be "a gratuitous dislocation of the processes of justice.",

overrules *Betts* v. *Brady*, 316 U. S. 455, rejects the traditions of state jurisprudence (*Appendix*), and holds that counsel must be appointed in *all* non-capital cases, even those involving only simple entry with intention to steal, then we concede that it makes no difference whether *these*

particular petitioners did or did not have, in their counsel's language, "special need for advice of counsel."

In short, if the court sets at naught the tradition of over half the states of the Union and declares categorically that in *all* serious crimes the accused must have counsel before entering a plea of guilty (unless the same is understandingly waived), the facts recited in the particular record will be the details of a single case and irrelevant in the face of such a general principle of constitutional law.

But if this court adheres to its view that the question of due process *vel non* in cases such as this depends upon the particular circumstances of each case, then the following observations upon the present record are important and, we submit, decisive:

Petitioners were accused of the crime of burglary by an indictment orthodox in form. Therefore, the fact that the text of the indictment was technical is not a special circumstance. They were charged with a crime that is simple in its *genus*. It was, so far as the record discloses or intimates, the simple crime of unlawfully entering the dwelling house of one J. V. Shaver with intent to steal and with actually stealing $5 belonging to Shaver.

They acknowledged their guilt of this crime in open court by a simple plea of guilty.

Of course, we admit that a charge of burglary *can* involve very intricate, indeed highly abstruse questions of law. For instance, one entering a banking house in Illinois with intent to enter into a highly complicated financial transaction might or might not be guilty of burglary depending upon whether the transaction, in all of its complexities and ramifications, would, if consummated, amount to a crime that Illinois deems felonious. Certainly, in such a case counsel, even widely experienced and erudite counsel, might be necessary.

So, too, identification of the culprit in even a simple act of burglary might require difficult applications of such sciences as finger printing, the chirography of questioned documents, or the like. In any such cases such decisions of this court as *Rice* v. *Olson*, 324 U. S. 786, are conclusive that the reception of an accused's plea of guilty (unless, perchance, the accused is more than ordinarily sophisticated, cf. *Adams* v. *United States*, 317 U. S. 269), without appointing counsel, denies due process.

But, we repeat, the cardinal questions in this case are, as we stated at pages 2 and 3, *ante*, *first*, whether due process requires the appointment of counsel in *all* non-capital state cases or only in those in which "special circumstances" are present; and *second*, if the latter, then whether such "special circumstances", upon a record silent as to the point, must be presumed to have existed or must be established by *de novo* proceedings such as *habeas corpus*, *coram nobis* or other original *nisi prius* proceedings.

If the historical view of the question is to prevail, then we think it is decisive that at the time that the plea was received the trial court had no discretion to impose any sentence other than the one that in fact it did impose. Therefore, there was not even authority, much less occasion, for a "trial." The accused were, in substance, asked whether they were guilty of the offenses of breaking with intent to steal and stealing, pleaded guilty to the charge and received the only sentence possible upon such a plea. There was no occasion either for delay or protracted proceedings.

If, as we contend and as this court has always held, "special circumstances" are necessary to require the appointment of counsel in non-capital cases simple in *genus*, then certainly Illinois may determine whether the existence of such circumstances will be presumed upon a common law

record or whether they must be shown either by a bill of exceptions or by evidence *aliunde* the record by such appropriate and readily available state remedies as *coram nobis* or the post conviction motion made in the case of *People* v. *Bogolowski*, already cited and discussed, 317 Ill. 460.

Conclusion.

For the reasons developed in this brief, it is submitted that the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
RAYMOND S. SARNOW,
JAMES C. MURRAY,
Assistant Attorneys General,
Of Counsel.

APPENDIX.

Study of the Right to Counsel in State Criminal Cases.

The following decisions hold or state that a failure to request counsel operates as a waiver of the right to counsel:

Alabama: *Mackreth* v. *Wilson*, 31 Ala. App. 191, 15 So. (2d) 112, Cert. den. 15 So. (2d) 114; California: *People* v. *Looney*, 9 Cal. App. (2d) 335, 49 P. (2d) 889; *Davis* v. *Crowder*, 78 P. (2d) 1039; Florida: *Weatherford* v. *State*, 76 Fla. 219, 79 So. 680; Georgia: *Rowland* v. *State*, 72 Ga. App. 793, 35 S. E. (2d) 372, 375; *Gatlin* v. *State*, 17 Ga. App. 406, 878 E. 151; *Gatlin* v. *State*, 87 S. E. 151, 17 Ga. App. 406; Idaho: *State* v. *Athens*, (1922), 36 Ida. 224, 210 P. 133, 134; Illinois: *People* v. *Fuhs*, 390 Ill. 41; *People* v. *Corbett*, 387 Ill. 41; *People* v. *Lavendowski*, 326 Ill. 173; *People* v. *Batey*, 392 Ill. 390; *People* v. *Parcora*, 358 Ill. 448; Indiana: *Loucks* v. *State*, 213 Ind. 108, 11 N. E. (2d) 694; Iowa: *Korf* v. *Jasper Co.* (1906), 132 Ia. 682, 108 N. W. 1031, 1032; Kansas: *Jones* v. *Amrine*, 154 Kan. 629, 121 P. (2d) 263; *Loftis* v. *Amrine*, 152 Kan. 464, 105 P. (2d) 890; *Ollen* v. *Amrine*, 127 P. (2d) 475, 155 Kan. 703; Kentucky: *Hamlin* v. *Commonwealth*, 287 Ky. 22, 152 S. W. (2d) 297; *Turner* v. *Commonwealth*, 89 Ky. 78, 1 S. W. 475; *Grogan* v. *Commonwealth*, 222 Ky. 482, 1 S. W. (2d) 779; *Holland* v. *Commonwealth*, 455 S. W. (2d) 476, 241 Ky. 813; Louisiana: *State* v. *Davis*, 171 La. 449, 131 So. 295; *State* v. *Murray* (1928), 165 La. 653, 115 So. 813; *State* v. *Sims*, 42 So. 494, 117 La. 1035; Michigan: *People* v. *Fries*, 294 Mich. 382, 293 N. W. 689; *People* v. *Haddad*, 306 Mich. 556, 11 N. W. (2d) 240, 241; Mississippi: *Dugan* v. *State*, 151 Miss. 781, 119 So. 298; Missouri: *State* v. *Miller*, ... Mo. ..., 292 S. W. 440, 442; *State* v. *Terry*, 201 Mo. 697, 100 S. W. 432; Montana: *State* v. *Fowler*, 196 P. 992; Nebraska: *Alexander* v. *O'Grady*, 137 Nebr. 645, 290 N. W. 718; *Davis* v. *O'Grady*, 137 Nebr. 708, 291 N. W. 82, 86; Ex Parte Tail, 145 Nebr. 268, 16 N. W. (2d)

161, 162; NEVADA: *State* v. *Mackinnon*, 168 P. 330, 41 N. W. 82; NEW JERSEY: *State* v. *Murphy*, 87 N. J. L. 515, 94 A. 640; *State* v. *Raney*, 63 N. J. L. 363, 43 A. 677; NEW YORK: *People* v. *Price*, 262 N. Y. 410, 187 N. E. 298, 300; PENNSYLVANIA: *Commonwealth* v. *Smith*, 344 Pa. 41, 24 Atl. (2d) 1; *Commonwealth* v. *Smith*, 147 Pa. Super. 423, 24 Atl. (2d) 724; *Commonwealth* v. *Burke*, 158 Pa. Super. 87, 43 Atl. (2d) 921; *Commonwealth* v. *Smith*, 158 Pa. Super. 104, 43 A. (2d) 906; *Commonwealth* v. *Ashe*, 141 Pa. Super. 408, 15 A. (2d) 409; *Commonwealth ex rel. Piccerelli* v. *Smith*, 27 A. (2d) 484; SOUTH CAROLINA: *State* v. *Jones*, 172 S. E. 129, 173 S. E. 77; TEXAS: *Brown* v. *State*, 118 Tex. Cr. R. 582, 40 S. W. (2d) 118; *Brady* v. *State*, 122 Tex. Cr. R. 275, 54 S. W. (2d) 513, 514; VIRGINIA: *Wilkinson* v. *Youell*, 180 Va. 321, 238 E. (2d) 356, 359; *Barnes* v. *Commonwealth* (1895), 92 Va. 794, 23 S. E. 784, 787; WEST VIRGINIA: *State* v. *Yoes* (1910), 67 W. Va. 546, 547, 68 S. E. 181; WYOMING: *James* v. *State* (1921), 27 Wyo. 378, 196 P. 1045.

The following decisions hold that there is a waiver of the right to counsel where the defendant pleads guilty to a non-capital criminal case and fails to request counsel:

GEORGIA: *Rowland* v. *State*, 72 Ga. App. 793, 35 S. E. (2d) 372, 375; KANSAS: *Jones* v. *Amrine*, 154 Kan. 629, 121 P. (2d) 263; *Loftis* v. *Amrine*, 152 Kan. 464, 105 P. (2d) 890; MICHIGAN: *People* v. *Fries*, 294 Mich. 382, 293 N. W. 689; NEBRASKA: *Alexander* v. *O'Grady*, 137 Nebr. 645, 290 N. W. 718; *Davis* v. *O'Grady*, 137 Nebr. 708, 291 N. W. 82, 86; *Ex Parte Tail*, 145 Nebr. 268, 16 N. W. (2d) 161, 162; PENNSYLVANIA: *Commonwealth* v. *Ashe*, 141 Pa. Super. 408, 15 A. (2d) 409; VIRGINIA: *Wilkinson* v. *Youell*, 180 Va. 321, 23 S. E. (2d) 356, 359.

Constitutional and Statutory Provisions of the Various States Relating to Right of Counsel.

ALABAMA:

Title 15, Section 318, Alabama Code 1940. Unless the prisoner is charged with a capital offense, the court is not required to appoint counsel for him.

Code of Alabama 1940, Title 15, Paragraph 318 Article 2.

> "*Appointing counsel to defend.*—When counsel appointed for defendant in capital cases * * * if the defendant is indicted for a capital offense, and is unable to employ counsel, the court must appoint counsel for him, not exceeding two, who must be allowed access to him, if confined, at all reasonable hours."

This section requires only that courts shall appoint counsel for a defendant who is indicted for a capital offense, and who is unable to employ counsel. This has been the extent of the duty enjoined upon trial courts, with respect to appointment of attorney for defendants, since the earliest history of the state. *Gilchrist* v. *State*, 234 Ala. 73, 74, 173 So. 651. See *Bethune* v. *State*, 26 Ala. App. 72, 153 So. 892.

ARIZONA:

Arizona Code Annotated 1939, Chapter 44, Section 44-904.

> "*Right to counsel on arraignment—duty and privilege of counsel—substitutions of counsel—effect of failure to assign.*—Before the defendant is arraigned on a charge of felony if he is without counsel, the court shall, unless the defendant objects, assign him counsel to represent him in the cause. Counsel so assigned shall serve without cost to the defendant, and shall have free access to the defendant, in private, at all reasonable hours while acting as counsel for him. Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of

the proceedings in substitution of counsel assigned him by the court. Failure to assign counsel before arraignment shall not affect the validity of any proceeding in the cause, if it appear that the defendant was subsequently represented by counsel whether assigned to him or of his own choosing and that the defendant was not in fact prejudiced by such failure."

ARKANSAS:

Constitution, Art. II, sec. 11, provides that in all criminal prosecutions the accused has a right to be heard by himself and counsel.

Pope's Digest of the Statutes of Arkansas, Ch. 43, sec. 3877, on the assignment of counsel, provides:

"If any person about to be arraigned upon indictment for a felony be without counsel to conduct his defense, and shall be unable to employ any, it shall be the duty of the court to assign him counsel at his request, not exceeding two * * *."

The Supreme Court of Arkansas has refused to review the contention of an accused that he was deprived of counsel when the record does not show that he requested the court to assign counsel nor any disinclination on the part of the court to discharge its duty in that respect. *Brown v. State*, 12 Ark. 623.

This section partially supersedes Paragraph 44-905.

"*Right of counsel—fees for services.*—If the defendant appeals for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the aid of counsel; if he desires counsel and declares upon examination by the court, under oath, that he has no means to employ the same, the court, in its discretion, may assign one (1) or more attorneys at law to that duty."

Right to appear and defend by counsel, Const., Art. 2 Par. 24.

CALIFORNIA:

Paragraph 987, Penal Code of California, Deering 1941.

"*Defendant on arraignment, to be informed of his right to counsel: When court to assign counsel.* If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him."

(Enacted 1872) Constitutional provisions: Const., Art. I, Par. 13; U. S. Const., Amdt. VI.

Paragraph 858.

"*Magistrate to inform the defendant of the charge, and his right to counsel.* When the defendant is brought before the magistrate upon an arrest, whether with or without warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings."

(Enacted 1872)

Paragraph 859.

"*Defendant to be taken before magistrate of superior court: delivery of copy of complaint and informed of right to counsel officer to take message to counsel without delay or fee.* When the defendant is charged with the commission of a public offense, over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he shall, without unnecessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to him a copy of the complaint, inform him of his right to the aid of counsel, ask him if he desires the aid of counsel, and allow him a reasonable time to send for counsel; and the magistrate must,

upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the city or township in which the court is situated. The officer must, without delay and without fee, perform that duty."

(Enacted 1872; Am. Stats. 1927, p. 1044; Stats. 1935, p. 492.)

COLORADO:

Colorado Statutes Annotated, Chapter 48, Paragraph 502.

"On indictments or information for crimes or misdemeanors in any of the district courts of this state where by reason of the inability of the defendant or defendants to employ counsel, the court may assign him or them counsel for his or their defense. It shall be the duty of the court so assigning counsel to allow him a fee, to be fixed by the judge of the court, to be paid out of the county treasury of the county wherein such indictment or information may be found."

Note: The statute cited provides "the court may assign him counsel, etc." and this would seem to be directive rather than mandatory. However, there are no Colorado cases interpreting directly the courts' duty under the the statute and the extent of its discretion in refusing to appoint counsel.

CONNECTICUT:

Art. I, sec. 9, of the Connecticut Constitution provides that an accused "shall have the right to be heard by himself and by counsel in criminal prosecutions."

Ch. 335, sec. 6476, General Statutes of Connecticut, Division of 1930, provides for the appointment by the court of a public defender whose duty it is to act as an attorney in defense of any defendant without funds sufficient to employ counsel of his own choice.

DELAWARE:

Art. I, sec. 7, of the Delaware Constitution provides that "in all criminal prosecutions the accused hath a right to be heard by himself and his counsel."

Revised Code of Dela. 1935, Sec. 4310, provides:

"* * * the said court (the court of General Sessions within the several counties) may assign counsel to any person on trial for any offense which is a felony."

FLORIDA:

Constitution, Section 11. Declaration of rights.

"In all criminal prosecutions, the accused * * * shall be heard by himself or counsel or both * * *."

General Statutes, 1906 Section 3969; Florida Compiled Laws, 1914.

"If any person shall be indicted for a felony or a misdemeanor or after an information shall be filed against him * * *, the court shall cause him to be arraigned and tried at the same term, unless good cause be shown for continuance and shall allow him counsel to assist him in his trial if he desires it."

Note: In *Weatherford* v. *State,* 79 So. 680 held:

"failure of trial judge to ask accused if he desired counsel or was unable to employ counsel did not warrant reversal."

Florida Revised Statutes 1941, Paragraph 909.21.

"*Appointment of counsel in capital cases.*—In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation as he deem reasonable, such sum to be paid by the county in which the crime was committed."

GEORGIA:

Park's Annotated Code of 1914, Volume 6, Penal Code. Paragraph 8, Section 8.

"*Benefit of Counsel.* Every person charged with an offense against the laws of this state * * *" Const. Art. I, Sec. 1 Par. 5 (Secs. 6361, C. C.)

Constitution:

"No person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this state in person, by attorney or both."

Civil Code, Section 6360.

Note: In *Gatlin* v. *State,* 87 So. 151 held, not error when court did not inform defendant of his constitutional right to have benefit of counsel.

IDAHO:

Section 8621.

"In a criminal act the defendant is entitled:

1. To a speedy and public trial.

2. To be allowed counsel as in civil action, or to appear and defend in person and with counsel."

State v. *Athens,* 210 Pac. 133 held:

"The fact, the defendant in a criminal case was not represented by counsel on the arraignment is not ground for setting aside an order continuing the case for the term. Defendant must request and be refused the right to have counsel."

Idaho Code Annotated 1932.

Section 19-1412.

"*Right to counsel.* If the defendant appears for arraignment without counsel he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel the court must assign counsel to defend him."

Section 19-1413.

"*Appointment of counsel for accused.* Whenever, upon the trial of a person, in the district court, upon an information, or indictment, it appears to the satisfaction of the court that the accused is poor and unable to procure the services of counsel, the court may appoint counsel to conduct the defense of the accused, for which services such counsel must be paid out of the county treasury, upon order of the judge of the court, such sum as the court may deem reasonable for the services rendered."

"Action of court in not advising defendant of his right to counsel, or asking him if he desired or was not able to employ counsel, but instead instantly assigning him such and fixing date for plea on the same day is not compliance with terms of statute which are mandatory."

State v. *Poglianich,* 43 Idaho 409, 252 Pac. 177.

ILLINOIS:

The rights to an accused in Illinois are discussed in the brief proper.

INDIANA:

Louks v. *State,* 213 Ind. 108, 11 N. E. (2d) 694.

In this case, the court held that the test of whether or not defendant was deprived of right to counsel depends on whether or not he entered his plea of guilty, "freely and understandingly."

In *Rhodes* v. *State,* the Indiana court says:

"This court has expressed disapproval of trial courts receiving pleas of guilty from defendants charged with serious crime, who are not represented by counsel, until after reasonable inquiry into the facts to discover whether a plea of guilty is entered freely and understandingly."

Indiana, in our opinion, does not infer waiver from a plea of guilty or, at least, there is no such necessary inference. The court, when deciding whether waiver has been made, examines carefully the charge or indictment and sees whether the accused, as a person of ordinary intelligence, could comprehend exactly what Acts he is charged with, etc.

IOWA:

Iowa Code 1939, Chaper 640, Paragraph 13773:

> "*Right to counsel.* If the defendant appears for arraignment without counsel, he must, before proceeding therewith, be informed by the court of his right thereto, and be asked if he desires counsel; and if he does, and is unable to employ any, the court must allow him to select or assign him counsel, not exceeding two, who shall have free access to him at all reasonable hours."

KANSAS:

The cases, *Loftis* v. *Amrine*, 152 Kan. 464, 105 Pa. (2d) 590, and *Jones* v. *Amrine*, 154 Kan. 629, 121 Pa. (2d) 263 held that under the statutes then in force, the trial court was not required to appoint counsel in non-capital cases in the absence of a request by the accused.

General Statutes 1935, 62-1304 in *Jones* v. *Amrine* held, accused who entered plea of guilty and made no request for counsel was not denied right to counsel because trial court did not advise him as to circumstances under which he might have been entitled to have counsel assigned.

The statutes under which these cases were decided read as follows: General Statute 1935, 62-1304.

> "If any person about to be arraigned upon an indictment or information for felony be without counsel to conduct his defense, and be unable to employ any, it shall be the duty of the court to assign him counsel at

his request, not exceeding two, who shall have free access to the prisoner at all reasonable hours."

This is not the Kansas law at the present time, as the 1935 statutes were replaced in 1941 by the following statute. General Statutes 1945, 62-1304.

> *"Counsel for accused; appointment, when; record of proceeding; privilege and duties of counsel; fee paid by county, when.* If any person about to be arraigned upon an indictment or information for any offense against the laws of this state, be without counsel to conduct his defense, it shall be the duty of the court to inform him that he is entitled to counsel, and to give him an opportunity to employ counsel of his own choosing, if he states that he is able and willing to do so. If he does ask to consult counsel of his own choosing, the court shall permit him to do so, if such counsel is within the territorial jurisdiction of the court. If he is not able and willing to employ counsel, and does not ask to consult counsel of his own choosing, the court shall employ counsel to represent him, unless he states in writing that he does not want counsel to represent him and the court shall find that the appointment of counsel over his objection will not be to his advantage. A record of such proceeding shall be made by the court reporter, which shall be transcribed and reduced to writing by the reporter, who shall certify to the correctness of such transcript, and such transcript shall be filed and made a part of the files in the cause."

The effect of this statute is not certain. *See Garrison* v. *Amrine,* 126 P. (2d) 228.

Accused may waive right to counsel by written instrument. *State* v. *Perkins,* 156 K. 323, 325, 133 P. (2d) 160.

KENTUCKY:

Bills of Rights, sec. 11, of the Kentucky Constitution provides that "in all criminal prosecutions the accused has the right to be heard by himself and counsel."

The Kentucky Supreme Court has held that a court need not assign counsel to an accused under Kentucky law unless he requests it and shows financial ability or lacks mental capacity to understand or conduct a defense. *Holland* v. *Commonwealth*, 241 Ky. 813, 45 S. W. (2d) 476; *Hamlin* v. *Commonwealth*, 287 Ky. 22, 152 S. W. (2d) 297; *Moore* v. *Commonwealth*, 298 Ky. 14, 181 S. W. (2d) 297.

LOUISIANA:

Article I, sec. 9 of the Louisiana Constitution provides for the right to be heard in criminal prosecutions by counsel.

Dart's Criminal Stats., sec. 602 provides:

> "Every person shall be allowed to make his defense by counsel learned in the law; and the court before whom he shall be tried or some judge thereof, shall immediately upon his request assign to him such counsel as he shall desire."

It has been held that the Louisiana court need not appoint counsel unless request is made. *State* v. *Davis*, 171 La. 449.

MAINE:

Declaration of Rights, sec. 6, of the Maine Constitution provides: "In all criminal prosecutions the accused shall have a right to be heard by himself and his counsel or either at his election.

MARYLAND:

Declarations of Rights, Art. 21, of the Maryland Constitution, provides that in a criminal prosecution every man has a right "to be allowed counsel."

The federal district court, has held that when a defendant pleaded guilty voluntarily and without improper induce-

ment insofar as Maryland law is concerned, the accused has waived the right to an appointment of counsel. *Gall* v. *Brady*, 39 Fed. Supp. 504, aff'd. 125 Fed. (2d) 253.

MASSACHUSETTS:

General Laws of Massachusetts 1932, Chapter 277, Section 47 and 48.

Section 47.

"If a prisoner, under indictment for a capital crime, pleads guilty, upon being arraigned, the court shall award sentence against him; if he does not plead guilty, the court may assign him counsel and take all other measures preparatory to a trial, which shall, subject to Section 72, be held as soon after the finding of the indictment after other official duties of the justices will admit and the circumstances of the cases require."

Section 48.

"If a defendant, in a capital case, does not plead guilty upon being arraigned before a district court or trial justice, the superior court may assign him counsel upon his petition, and upon certification to the superior court of the record of the arraignment and plea by the clerk of the district court, or by the trial justice before whom the arraignment was held. The case shall, thereupon be continued until the assignment of counsel has been made and certification thereof received by the clerk of the district court or by the trial justice."

MICHIGAN:

Compiled Laws Michigan 1929, Chapter III, Section 17129.

"*Right of accused; hearing by counsel, defense, confronting witnesses.* Section 1. On the trial of every indictment, or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to pro-

duce witnesses and proofs in his favor, and meet the witness who are produced against him face to face."

Constitution II, 19.

Compiled Laws of Michigan 1929, Chapter III, Section 17129.

"Appointment of counsel for accused is discretionary with court and one who pleads guilty is not entitled to such appointment."

People v. *Harris,* 266 M 317, 253 N. W. 312.

Constitutional provisions securing to an accused right to have assistance of counsel have been held not applicable where one confesses to crime and pleads guilty without requesting assistance of counsel. *People* v. *Crandell,* 270 Mich. 124, 258 N. W. 224.

MINNESOTA:

Minnesota Statutes 1945, Chapter 630, Section 630.10.

"*Defendant informed of his right to counsel.* If the defendant shall appear for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the aid of counsel."

The statute was not followed formally, but the court substantially informed the defendant of his right to counsel. *State* v. *McDonnell,* 165 M 425, 206 N. W. 952.

MISSISSIPPI:

Code 1930 Annotated, Chapter 21, Section 1262.

"*In capital cases, copy of indictment and special venire served to be given—counsel permitted.*—Any person indicted for a capital crime shall, if demanded by him, by motion in writing, before the completion of the drawing of the special venire, have a copy of the indictment and list of special venire summoned for his trial, delivered to him or his counsel, at least, one en-

tire day before said trial. And person in jail charged with a direct capital crime, or who is indicted for such crime, and who is unable to employ counsel, shall, at his request, be allowed counsel not exceeding two, to be sworn by him by the judge in vacation or by the court, to defend him in the circuit court, upon the trial of such charge, and such counsel selected and appointed by the judge or court shall have free access to the prisoner, who shall have process to compel the attendance of witness in his favor."

No duty to assign counsel in non-capital cases. *Reed* v. *State*, 143 Miss. 686, 109 S. 715.

MONTANA:

Revised Codes of Montana 1935 Annotated, Chapter 73, Section 11886.

"*Right to counsel on arraignment.* If the defendant appear for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him."

See State v. *Murphy*, 68 M 427, 429, 219 P 629.

MISSOURI:

The trial court is required to assign counsel on request.

Missouri Rev. Stats. Anno., Section 4003.

NEBRASKA:

Compiled Statutes of Nebraska 1929, Chapter 29, Article 18.

Section 29-1803.

"*Court to assign counsel for accused, when, counsel fees audited and allowed by court, public defender.*

> The court before whom any person shall be indicted for any offense which is capital, or punished by imprisonment in the penitentiary, is hereby authorized and required to assign to such person counsel, not exceeding two, if the prisoner has not the ability to procure counsel, and they shall have full access to the prisoner at all reasonable hours."

The constitutional right of accused to have assistance of counsel may be waived and a waiver may be implied where the accused being without counsel fails to demand an attorney to counsel him. *Ex Parte Tail,* 16 N. W. (2d) 161.

NEVADA:

122 Pac. (2d) 862, *Ex Parte Kramer.*

NEW HAMPSHIRE:

Bill of Rights, Fifteenth, formulates the right of an accused to be heard "by himself and counsel."

New Hampshire Rev. Laws 1942, Ch. 428:

Capital Cases, sec. 1, provides in substance, that counsel to be assigned the accused by the court *at his request* if accused is poor and unable to defray the expense of procuring their attendance.

Other Cases, sec. 2:

> "Any person held to the grand jury charged with any other offense the punishment whereof may be three years' imprisonment, is entitled to have counsel assigned him by the court if *the court shall be of the opinion* that he is poor and unable to defray the expense of procuring their attendance." (Emphasis added.)

NEW JERSEY:

Revised Statutes of New Jersey 1937, Chapter 190, Section 2:190-3.

"*Counsel for accused; compensation—homicide cases.* The court before which any person tried upon indictment shall, if he is not able to procure counsel, assign to him counsel, not exceeding two, who shall have free access to such prisoner at all reasonable hours."

NEW MEXICO:

Constitution, Art. II, sec. 14, asserts the right of an accused to "appear and defend in person and by counsel."

New Mexico Statutes 1941, Crim. Procedure, sec. 42-1102, provides that the court is authorized and required to assign counsel to an accused charged with any offense which is capital or punishable by imprisonment in the penitentiary if the accused has no means to procure counsel. No judicial decisions clearly establishing the right to have counsel assigned appear.

In *State* v. *Garcia*, 47 New Mex. 319, 142 Pac. (2) 552, defendant without counsel entered a plea of guilty to murder in the second degree. Although it does not appear whether accused came within the purview of the statute above, the court held that the defendant's contention was reduced to the proposition that an accused may not plead guilty except upon advice of counsel. The court held there was an intelligent waiver of the right to counsel and due process was satisfied.

NEW YORK:

Gilbert's Criminal Code 1927. Chapter IV, Section 308.

"*Defendant appearing for arraignment without counsel to be informed of his right to counsel.* If the defendant appearing for arraignment without counsel, he must be asked if he desires the aid of counsel,

and if he does the court must assign counsel. When services are rendered by counsel in pursuance of such assignment in a case where the offense charged in the indictment is punishable by death or on an appeal from a judgment of death, the court in which the defendant is tried or the action of the indictment is otherwise disposed of, or by which the appeal is finally determined, or the court in which an action is suspended or discontinued or otherwise disposed of on the ground that the defendant has been heretofore or is hereafter declared incompetent by a duly appointed commission, may allow such counsel his personal and incidental expenses upon a verified statement thereof being filed with the clerk of such court, and also reasonable compensation for his services in such court, not exceeding the sum of one thousand dollars."

See People v. *Youlio*, 154 N. E. 588. Defendant was not informed of his right on arraignment and pleaded guilty. Error disregarded. *See People* v. *Price*, 262 N. Y. 410, 187 N. E. 298.

NORTH CAROLINA:

General Statutes of North Carolina 1943, Chapter 15, Section 15-4.

"*Accused entitled to counsel.*—Every person accused of any crime whatsoever, shall be entitled to counsel in all matters which may be necessary for his defense. (Rev. S. 3150; Code, s 1182; R. C., c. 35, s 13; 1777, c 115, s 85; C. S. 4515. (1945 Cumulative Supplement).

Section 15-4.

"*Accused entitled to counsel. Right is a mandate in capital felony cases.* The right to have counsel as well as the right of confrontation is guaranteed."

Article I, Section 11, N. C. Const. Where the crime charged is a capital felony, this right becomes a mandate.

State v. *Farrell*, 223 N. C. 321, 327, 26 S. E. (2d) 322.

NORTH DAKOTA:

Constitution, Art. I, sec. 13, phrases the right of an accused "to appear and defend in person and by counsel."

North Dakota Revised Code 1943, Judicial Criminal Procedure, sec. 29.0127, provides:

> "In all criminal actions, when it is satisfactorily shown to the court that the defendant has no means and is unable to employ counsel, the court shall appoint and assign counsel for his defense. • • •"

It does not appear that there are any North Dakota cases interpreting expressly the court's duty under the statute and the extent of its discretion in appointing counsel.

OHIO:

Page's Annotated Ohio General Code: Chapter 18, Section 13439-2.

> "*Assigning counsel to defend.* After a copy of the indictment has been served or opportunity had for receiving it, as provided in the next preceding section, the accused shall be brought into court, and if he is without and unable to employ counsel, the court shall assign him counsel, not exceeding two, who shall have access to such accused at all reasonable hours."

OKLAHOMA:

The Oklahoma Constitution, Art. II, sec. 20, phrases the right of an accused as that to be heard "by himself and counsel."

Oklahoma Stats., Title 22, Ch. 7, sec. 464:

> "If the defendant appear for arraignment, without counsel, he must be informed by the court that it is his right to have counsel before being arraigned and must be asked if he desire the aid of counsel. If he desires, and is unable to employ counsel, the court must assign counsel to defend him."

The Oklahoma courts have held the above statute applicable to every person accused of a felony. In *Ex Parte Barnett* (1939), 67 Okla. Criminal Rep. 300, 94 P. (2) 18, the Appellate Court ordered the prisoner discharged under this statute for failure of the trial court to inform him it was the court's duty to appoint counsel if he had no means.

However, the following cases of *Ex Parte Robnett* (1940), 69 Okla. Crim. Rep. 235, 101 P. (2) 645; and *Ex Parte Pennington* (1941), 71 Okla. Crim. Rep. 263, 110 P. (2) 923, although the courts in these cases affirmed their right under proper conditions to discharge defendants, they remanded them instead to the trial court to proceed as if there had been no arraignment.

OREGON:

Constitution, Art. I, sec. 11, phrases the right of an accused to be heard "by himself and counsel."

Compiled Laws, Penal Code, sec. 26-803, provides that if a defendant appear for arraignment without counsel he must be informed by the court that it is his right to have counsel before being arraigned and must be asked if he desires the aid of counsel.

Section 26-804 provides, in substance, that whenever it shall appear upon arraignment of a person accused of a crime against the State of Oregon that such person is without funds and unable to retain his or her own counsel, the court, upon request of the accused, appoint suitable counsel.

That the court at the time of arraignment inform the accused of his right to counsel guaranteed him by the laws of the state will be presumed on appeal where the judgment is silent on such matters. An affirmative recitation that there was compliance with the above statutes is not neces-

sary. It is presumed that the requirements were observed by the court. *Ex Parte Loundagin* (1929), 129 Ore. 652, 278 P. 950.

PENNSYLVANIA:

Commonwealth v. *Valerio*, 178 Atl. 509, 118 Pa. Super 34; Conviction without informed of right to be represented by counsel—held reversal by error. *Commonwealth* v. *Cohen*, 186 Atl. 203, 123 Pa super 5. See also *Commonwealth* v. *Haas*, 141 Pa Superior 408, 15 Atl. (2d) 409, held no duty to appoint counsel if pleaded guilty.

RHODE ISLAND:

Constitution, Art. I, sec. 10, provides that in all criminal prosecutions an accused has the right to have assistance of counsel in his defense.

General Laws, Ch. 625, sec. 62:

> "The superior court may appoint, whenever occasion may require, one or more attorneys to conduct the defense of any indigent person charged with any offense against the laws of the State."

This statute is but permissive and the appointment of counsel in all cases rests in the sound discretion of the court. (*State* v. *Hudson*, 55 R. I. 141, at 152.)

SOUTH CAROLINA:

Laws of South Carolina, 1942, Code Crim. Proc. sec. 980, provides that in capital offenses:

> "• • • in case any person so accused or indicted shall desire counsel the court is authorized and required, immediately upon his request, to assign to such person such, and so many counsel not exceeding two as the presiding judge shall designate, • • •."

In *State* v. *Jones*, 172 S. C. 130, 173, S. E. 77, where defendants were convicted of a non-capital offense, the court held that the trial court was not required to assign counsel for defendants not represented by attorneys.

SOUTH DAKOTA:

Vol. II, South Dakota Code of 1939, Ch. 35.29, sec. 34.2905, provides that a defendant in a criminal action has the right to defend in person and by counsel.

Ch. 34.19, secs. 34.1901 and 34.1902, provide that any criminal court shall appoint counsel for a defendant when it is satisfactorily shown that the defendant is without means to employ counsel.

Ch. 34.23, sec. 34.2302, requires that a trial judge fully advises a person of his rights before permitting entry of a plea of guilty.

In *State* v. *Haas*, 69 S. D. 204, in holding that a petitioner who refused the aid of counsel and pleaded guilty to a felony was entitled by the due process clause of the Fourteenth Amendment to a hearing on the question of whether or not he had intelligently waived counsel upon a showing by the defendant through his counsel that he was without sufficient power of mind in understanding to make an intelligent waiver of his rights, said with reference to the requirement of counsel by that state's constitution:

> "We do not now decide whether the aid of counsel to one charged with crime is of the essence of due process under our State constitution. We do decide and hold that lack of such a fair trial, as the due process provisions require, may arise from lack of counsel that for such a waiver of the right to defend by counsel to be binding on a defendant it must be made voluntarily and intelligently by a competent mind; and that proceedings in a capital case conducted without the aid of counsel should be scrutinized with the utmost of care."

TENNESSEE:

Constitution, Art. I, sec. 9, provides that an accused has a right to be heard by himself and by his counsel in all criminal prosecutions.

Williams Tenn. Code, sec. 11734, provides: If the accused is unable to employ counsel he is entitled to have counsel appointed by the court.

The only case found dealing with the court's duty under the statute and the discretion in refusing to him appointed counsel, is *Kizer* v. *State*, 80 Tenn. (12 L. E. A.), 564, 566, which holds that this right is subject to the control of the courts in the exercise of a sound judicial discretion.

TEXAS:

Constitution, Art. I, sec. 10, provides that the accused "shall have the right of being heard by himself, or counsel, or both."

Texas Code, Crim. Procedure 1925, Art. 3, Art. 494, provide:

> "When the accused is brought into court for the purpose of being arraigned, if it appear that he has no counsel and is too poor to employ counsel, the court shall appoint one or more practicing attorneys to defend him."

This statute applies only to capital cases, and it is only in cases of that character that the court is required to appointed counsel under it. *Moreno* v. *State* (Crim. App.), 26 S. W. (2d) 652. The court may appoint counsel in other cases as a matter of grace; the matter rests in the court's discretion and failure or refusal to do so is not ground for reversal. *Cummings* v. *State*, 104 Crim. Rep. 117, 282 S. W. 227.

The statute is mandatory in capital cases, but the right to have counsel appointed under it may be waived by a

failure to specifically requirest counsel. *Compton* v. *State*, 67 Crim. Rep. 15, 148 S. W. 581; *State* v. *Jones*, 172 S. W. 129, 173 S. W. 77.

UTAH:

Constitution Art. I, secs. 7-13.

Utah Code, Criminal Proc. Titles 105-1-8, 105-22-12, provides that if the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked whether he desires the aid of counsel. If he desires, but is unable to employ counsel, the court must assign counsel to defend him. This applies in capital and non-capital cases alike. However, the accused may waive this right by conduct and action at the time of his trial. *State* v. *Mewhinney*, 43 U. 135, 134 P. 632; *State* v. *Aikers*, 87 U. 507, 51 P. (2d) 1052.

VERMONT:

Constitution, Ch. I, Art. 10.

General Laws, Ch. 101, sec. 2327, provides that a person accused has a right to be heard by himself and his counsel.

There are no Vermont cases interpreting directly the court's duty under the statute and the extent of its discretion in refusing to appoint counsel.

However, General Laws, Ch. 101, sec. 2370, provides for the compensation of counsel assigned to defend a respondent in certain criminal cases. The court's duties to assign counsel are not set out under the provision or any other provision pertaining to the appointment of counsel for an indigent accused anywhere in the General Laws.

In the case of *State* v. *Gomez*, 89 Vt. 490, the court, in

discussing an accused's rights under section 2370, held that under this section the court within its discretion may refuse to assign counsel if the court believes the defendant has means.

VIRGINIA:

There is no specific provision in the Virginia Constitution guaranteeing the person accused of crime the right to have assistance of counsel. But the Virginia courts hold that it is a right guaranteed to accused under their Bill of Rights, sec. 8, Constitution of Virginia. *Barnes* v. *Virginia*, 92 Va. 794, 23 S. E. 784.

It is the Virginia law that courts of record with criminal jurisdiction possess the inherent power to appoint counsel to defend paupers and other indigent persons charged with crime. *Watkins* v. *Commonwealth*, 174 Va. 518.

A waiver of the right to counsel is implied where the accused appears without counsel and fails to request that counsel be appointed. *Wilkinson* v. *Youell*, 180 Va. 321, 23 S. E. (2d) 356.

WASHINGTON:

Remington Revised Stats. of Washington, Criminal Code, Title 13, Ch. 16, sec. 2095, provides:

> "If the defendant appear without counsel he shall be informed by the court that it is his right to have counsel before being arraigned and he shall be asked if he desire the aid of counsel, and if it appear that he is unable to employ counsel, by reason of poverty, counsel shall be assigned him by the court."

Section 2305 provides:

> "Whenever a defendant shall be arraigned upon the charge that he has committed any felony and shall request the court to appoint counsel to assist in his

defense and shall by his oath or such other proof as may be required to satisfy the court that he is unable by reason of poverty to procure counsel, the court shall appoint counsel, not exceeding two, for such defendants, to be paid • • •."

The Washington courts have upheld a conviction of a felony upon a plea of guilty made without the advice of counsel where it did not affirmatively appear of record that the defendant was advised of his right to counsel. *State* v. *Schofield*, 129 Wash. 295.

WEST VIRGINIA:

Constitution, Art. III, sec. 14, provides that in criminal trials the accused "shall have the assistance of counsel."

The West Virginia courts have held that the right to have counsel is a mere privilege guaranteed by the Constitution. If it differs in nature as well as in form from the guaranty of a trial by jury, the latter is prohibitory in form, while the other is permissive and conditional on the pleasure of the accused. No invasion of this guaranty is disclosed, therefore, unless a request for the assistance of counsel appears by the record to have been denied by the court, right to counsel may be waived or renounced and it is not denied by a mere failure to assign counsel. *State* v. *Yoes*, 67 W. Va. 546, citing *People* v. *Schinger*, 102 Ill. 241.

WISCONSIN:

Wisconsin Constitution, Art. I, sec. 7, guarantees the right to counsel to an accused.

Chapter 448, Laws of 1942, section 357.26, Stats. provides that a court may appoint counsel for an indigent accused. Paragraph 2 of this statute provides:

"Upon arraignment and before plea of any person charged with a felony he shall be advised by this court

of his right to counsel and a record shall be made of such advice upon the minutes of the court or in a transcript of the proceedings."

The Supreme Court of Wisconsin has held that even in the face of such provisions of the Wisconsin statutes an accused is not entitled to his release (in *habeas corpus* based on the claim that he was denied due process of law because he was not advised of his right to counsel prior to his plea of guilty as provided in the above cited statute. The court held that the petitioner should aver the following matters: (1) whether he knew he was entitled to the benefit of counsel, and if so, why he did not request the court to appoint counsel; (2) whether he made any effort to procure counsel and if he did not do so, the reason for his failure; (3) whether he was capable of making his own defense; (4) whether he was denied the right to confer with persons other than inmates of the place where he was confined; and (5) whether he knew the consequences of his plea of guilty. *State ex rel. Doxtater* v. *Murphy*, 248 Wisc. 593.

WYOMING:-

Constitution, Art. I, sec. 10, provides that the accused shall be granted the right to counsel in a criminal case.

Wyoming Compiled Stats. 1945, Art. VIII, sec. 10-805, provides that if an accused be without counsel or unable to employ any, "it shall be the duty of the court to assign him counsel at his request * * *."

The right or privilege to defend by counsel as guaranteed by the Constitution, Art. I, sec. 10, may be waived or renounced and it is not denied by a mere failure to assign counsel, there being no invasion of it disclosed unless it appears by the record that a request for assignment of counsel was denied by the court. *James* v. *State*, 27 Wyo. 378, 196 P. 1045.